

ESTTA Tracking number: **ESTTA609047**Filing date: **06/10/2014**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**Petition for Cancellation**

Notice is hereby given that the following party requests to cancel indicated registration.

Petitioner Information

Name	Doctors Online Services, LLC, dba Fruition		
Entity	limited liability company	Citizenship	Colorado
Address	201 Fillmore Street # 200 Denver, CO 80206 UNITED STATES		

Attorney information	Katherine Keating Bryan Cave LLP 560 Mission Street, 25th Floor San Francisco, CA 94105-2994 UNITED STATES katherine.keating@bryancave.com, joel.rayala@bryancave.com, sftmdocket@bryancave.com Phone:415-268-1972
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Registration Subject to Cancellation

Registration No	3898460	Registration date	01/04/2011
International Registration No.	NONE	International Registration Date	NONE
Registrant	Fruition Interactive, Incorporated First Canadian Place, Suite 350 Toronto, Ontario, M5X1C1 CANADA		

Goods/Services Subject to Cancellation


Class 042. First Use: 2005/06/30 First Use In Commerce: 2005/06/30
All goods and services in the class are cancelled, namely: Graphic design and user experience design, search engine optimization; computerservices, namely, software design, software programming, software engineering, installing software, configuring software, and computer system administration for others; installing and configuring computer software and hardware systems to measure web site and e-mail marketing performance


Grounds for Cancellation

Priority and likelihood of confusion	Trademark Act section 2(d)
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Marks Cited by Petitioner as Basis for Cancellation

U.S. Registration No.	3193134	Application Date	02/14/2006
Registration Date	01/02/2007	Foreign Priority Date	NONE

Word Mark	FRUITION		
Design Mark			
Description of Mark	NONE		
Goods/Services	<p>Class 035. First use: First Use: 2002/08/01 First Use In Commerce: 2002/08/01 Advertising and marketing; Advertising,marketing and promotion services; Advice in the field of business management and marketing; Arranging and conducting marketing promotional events for others; Business advice and analysis of markets; Business consultation and management regarding marketing activities and launching of new products; Business management consulting with relation to strategy, marketing, production, personnel and retailsale matters; Business marketing and direct mail consulting services; Business marketing consulting services; Business marketing services; Commercial information agencies; Conducting business and market research surveys; Conducting marketing studies; Cooperative advertising and marketing; Cooperative advertising and marketing services by way of solicitation, customer service and providing marketing information via websites on a global computer network; Creation of marketing tools designed to increase a client company's knowledge of customer needs, and its competitors' products and services, pricing, advertising strategy and sales strategy; Development of marketing strategies and concepts; Direct marketing advertising for others; General business merchandising services, namely, marketing; Implementation and follow-up of advice in the fields of marketing; Information or enquiries on business and marketing; Market segmentation consultation; Market study and analysis of market studies; Marketing consulting; Marketing services, namely providing informational web pagesdesigned to generate sales traffic via hyperlinks to other web sites; Outsourcing in the field of sales and marketing of computer software; Promoting, advertising and marketing of the on-line websites of others; Promotion and marketing services and related consulting; Promotion,advertising and marketing of on-line websites; Providing business marketing information; Statistical evaluations of marketing data</p>		
U.S. Application No.	86040704	Application Date	08/16/2013
Registration Date	NONE	Foreign Priority Date	NONE
Word Mark	FRUITION		

Design Mark	
Description of Mark	NONE
Goods/Services	Class 042. First use: First Use: 2002/08/01 First Use In Commerce: 2002/08/01 Computer services, namely, cloud hosting provider services; Computer services, namely, search engine optimization; Computer software development in the field of mobile applications; Consulting services in the field of cloud computing; Consulting services in the field of software as a service (SAAS); Creation, design, development and maintenance of Web sites for third parties; Internet-based application service provider, namely, hosting, managing, developing, analyzing, and maintaining the code, applications, and software for web sites of others; Platform as a service (PAAS) featuring computer software platforms for marketing and data analysis, health care medical records, appointment scheduling, search engine optimization, security and log management services; Web site hosting services

Attachments	78814764#TMSN.jpeg(bytes) 86040704#TMSN.jpeg(bytes) Petition to Cancel FII.PDF(82475 bytes)
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Certificate of Service

The undersigned hereby certifies that a copy of this paper has been served upon all parties, at their address record by First Class Mail on this date.

Signature	/katherine keating/
Name	Katherine Keating
Date	06/10/2014

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

DOCTORS ONLINE SERVICES, LLC,
DBA FRUITION,

Petitioner,

v.

FRUITION INTERACTIVE,
INCORPORATED,

Registrant.

Cancellation No. _____

Serial No.: 77/723,664

Reg. No.: 3,898,460

Mark: FRUITION INTERACTIVE

Filed: April 28, 2009

Registered: January 4, 2011

Class: 42

PETITION TO CANCEL

Doctors Online Services, LLC, dba Fruition ("Fruition") believes and alleges that it has been and will continue to be damaged by the registration of the above-referenced mark, and hereby petitions for cancellation pursuant to 15 U.S.C. § 1064. As grounds for cancellation, Fruition alleges the following:

The Parties

1. Fruition is a Colorado limited liability company with its principal place of business at 201 Fillmore Street #200, Denver, Colorado 80206.
2. Fruition is informed and believes that Fruition Interactive, Incorporated ("FII") is a Canadian corporation with its principal place of business at First Canadian Place, Suite 350 Toronto, Ontario, Canada M5X1C1.

Fruition's FRUITION® Mark

3. Fruition has offered technology-based advertising and marketing services under its FRUITION® mark for more than 10 years.
4. Since 2002 Fruition has used its FRUITION mark with services including search

engine optimization; social media management; the measurement and analysis of web site and e-mail marketing performance; and the design and development of web sites and applications, including graphic design and user experience design. Software design, programming, engineering, and configuration is a key component of many of these services.

5. Fruition owns an incontestable federal registration for its FRUITION mark in class 35 in connection with:

advertising and marketing; advertising, marketing and promotion services; advice in the field of business management and marketing; arranging and conducting marketing promotional events for others; business advice and analysis of markets; business consultation and management regarding marketing activities and launching of new products; business management consulting with relation to strategy, marketing, production, personnel and retail sale matters; business marketing and direct mail consulting services; business marketing consulting services; business marketing services; commercial information agencies; conducting business and market research surveys; conducting marketing studies; cooperative advertising and marketing; cooperative advertising and marketing services by way of solicitation, customer service and providing marketing information via websites on a global computer network; creation of marketing tools designed to increase a client company's knowledge of customer needs, and its competitors' products and services, pricing, advertising strategy and sales strategy; development of marketing strategies and concepts; direct marketing advertising for others; general business merchandising services, namely, marketing; implementation and follow-up of advice in the fields of marketing; information or enquiries on business and marketing; market segmentation consultation; market study and analysis of market studies; marketing consulting; marketing services, namely providing informational web pages designed to generate sales traffic via hyperlinks to other web sites; outsourcing in the field of sales and marketing of computer software; promoting, advertising and marketing of the on-line websites of others; promotion and marketing services and related consulting; promotion, advertising and marketing of on-line websites; providing business marketing information; statistical evaluations of marketing data

(Reg. No. 3,193,134) (the “Fruition Registration”). The Fruition Registration issued on January 2, 2007, with a first-use date of August 1, 2002.

6. Fruition also owns a pending application for its FRUITION mark in connection with the following services:

computer services, namely, cloud hosting provider services; computer services, namely, search engine optimization; computer software development in the field of mobile applications; consulting services in the field of cloud computing; consulting services in the field of software as a service (SaaS); creation, design, development and maintenance of web sites for third parties; internet-based application service provider, namely, hosting, managing, developing, analyzing, and maintaining the code, applications, and software for web sites of others; platform as a service (PaaS) featuring computer software platforms for marketing and data analysis, health care medical records, appointment scheduling, search engine optimization, security and log management services; web site hosting services

(App. No. 86/040,704) (the “Fruition Application”). Fruition filed the Fruition Application on August 16, 2013, on the basis of use in commerce, with a first-use date of August 1, 2002.

7. Fruition’s use of its FRUITION mark with its services has been continuous since 2002.

8. Fruition has used and continues to use its FRUITION mark among the relevant purchasing public and consumers to identify the source and origin of Fruition’s high-quality services and to distinguish such services from products and services offered by its competitors and others.

9. Fruition has expended, and continues to expend, a substantial amount of resources, money, time, and effort promoting, marketing, advertising, and building consumer recognition and goodwill in its extremely valuable services under and in connection with its FRUITION mark.

FII's FRUITION INTERACTIVE Registration

10. On April 28, 2009, Juice filed a federal trademark application (App. No. 77/723,664) for the mark FRUITION INTERACTIVE in class 35 in connection with the following services:

web development services; online marketing services, namely, providing strategic consulting, online advertising agency services, graphic design and user experience design, search engine optimization and search engine marketing, and providing electronic newsletters and e-mailing marketing; computer services, namely, software design, software programming, software engineering, installing software, configuring software, and computer system administration; installing and configuring computer software and hardware systems to measure website and e-mail marketing performance; consultation in the field of website and e-mail marketing performance and measurement,

claiming a first-use date of June 30, 2005 (the "FII Application").

11. The Patent and Trademark Office issued an office action against the FII Application on July 24, 2009. Among the issues raised by the Examining Attorney was the confusing similarity of the FRUITION INTERACTIVE mark with Fruition's FRUITION mark in the Fruition Registration.

12. In response to the citation of the Fruition Registration, FII amended the services recitation in the FII Application so that the class 35 services consisted of "*online marketing services, namely, providing strategic consulting, online advertising agency services, and search engine marketing, and e-mail marketing; consultation in the field of web site and e-mail marketing.*" FII moved the remaining services to newly added class 42.

13. On December 11, 2009, the Examining Attorney issued a final office action maintaining the refusal to register based on the Fruition Registration.

14. In response to the final office action, FII further amended the FII Application to delete all of the class 35 services and to delete "*web site design services for others*" from the

class 42 services, and the Examining Attorney withdrew the refusal to register based on the Fruition Registration.

15. On January 24, 2011, Registration No. 3,898,460 issued from the FII Application in connection with the following services:

Graphic design and user experience design, search engine optimization; computer services, namely, software design, software programming, software engineering, installing software, configuring software, and computer system administration for others; installing and configuring computer software and hardware systems to measure web site and e-mail marketing performance (class 42)

(the “FII Registration”).

16. Fruition subsequently filed the Fruition Application in class 42 in connection with various services it had offered under its FRUITION mark since before 2005.

17. The Patent and Trademark Office has now issued an office action against the Fruition Application, citing the FII Registration as a barrier to registration based on Section 2(d) of the Lanham Act.

Priority and Likelihood of Confusion

18. Fruition’s first use of its FRUITION mark in connection with the same services covered by the FII Registration pre-dates the June 30, 2005 first-use date alleged in the FII Registration. Accordingly, Fruition is the senior user, and priority is not an issue in these proceedings.

19. The mark FRUITION INTERACTIVE is virtually identical to Fruition’s FRUITION mark in sight, sound, and commercial impression. The only difference between the marks is the additional term “interactive,” which FII has disclaimed as merely descriptive.

20. The services listed by the FII Registration overlap with services listed in the Fruition Registration and offered by Fruition under its FRUITION mark for more than 10 years.

21. Upon information and belief, the services Fruition offers under its FRUITION mark and the services FII offers under the FRUITION INTERACTIVE mark are directed to the same class of purchasers.

22. Upon information and belief, the services Fruition offers under its FRUITION mark and the services FII offers under the FRUITION INTERACTIVE mark are offered in the same channels of trade.

23. The FRUITION INTERACTIVE mark, when applied by FII to the services set forth in the FII Registration, is likely to cause confusion or mistake or to deceive or mislead the relevant trade, consumers, and purchasing public as to the source of the parties' services and/or as to whether FII's services are sponsored, approved, or endorsed by or are otherwise related to Fruition.

24. The FII Registration is likely to lead the public to incorrectly conclude that the services with which FII uses the FRUITION INTERACTIVE mark are or have been authorized, sponsored, or licensed by Fruition, resulting in damage to Fruition and the public.

25. The FII Registration has damaged or is likely to damage Fruition because the Registration supports and assists FII in confusing and misleading the public in its use of the FRUITION INTERACTIVE mark, creates the misleading impression that Fruition is sponsoring or otherwise authorizing FII's use of the FRUITION INTERACTIVE mark, creates the misleading impression that Fruition has approved the services offered by FII under the FRUITION INTERACTIVE mark, and gives the color of exclusive right to FII in violation and derogation of the prior and superior rights of Fruition.

26. The FII Registration has further damaged Fruition by posing a barrier to registration of Fruition's FRUITION mark for services in class 42 which Fruition has offered

under its FRUITION mark since before FII's alleged first use of the FRUITION INTERACTIVE mark.

27. The continued registration of the FRUITION INTERACTIVE mark by FII would be inconsistent with Fruition's rights in its FRUITION mark under the common law and the Lanham Act.

WHEREFORE Fruition prays that its petition be granted and Registration No. 3,898,460 be canceled in its entirety.

Respectfully submitted,

BRYAN CAVE LLP

Dated: June 10, 2014



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Fruition